United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-1576

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B P/S

UNITED STATES OF AMERICA,
Appellee

-v-

JAMES F. HEIMERLE, RICHARD WARME,
a/k/a/ Richard Warner

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTARY
REPLY BRIEF FOR JAMES F. HEIMERLE

JAMES F. HEIMERLE
Defendant-Appellant

The governement's reliance on the host of cases they cite is simply misplaced as it relates to Heimerle's points II and III (points V and VI of the government's brief) due to the fact that Heimerle did not place his character into issue. And although they have attempted to show this court that Heimerle's attorney ' opened the door ' to Heimerle's being in prison to the jury. The record will not bear this out,because in response to the prosecutor's question,Mr. Horowitz stated:

> " He [Heimerle] told me at that time he was in the half-way house, that he had a limited time to talk to me, because he had to get back to his place before eleven o'clock that evening....."
> (trial transcript page 24)

Moreover, when Mr. Horowitz was asked the following by the prosecutor while on direct:

> " Mr. Horowitz, did you ever tell Mr. Heimerle about your criminal background?

Horowitz replied:

> " He[Heimerle] knew. That I had served time in a Federal as well as a State institution."

In anticipation of the prosecutor's next questions answer

> " And how did he [Heimerle] know?

Heimerle's attorney attempted to get the Courts attention but the prosecutor knowing what the next answer would be continued with his leading loaded question:

> " How did he [Heimerle] know?

Horowitz replied:

> " How do I know?

The prosecutor knowing what the result of his goading Horowitz would be, continued with:

> " How did you know he [Heimerle] knew?

The answer of which was not unanticipated by the prosecutor:

" He [Heimerle] stated he met Joe Peters in GreenHaven Prison. "

Heimerle's attorney moved for an immediate mistrial. It was denied.

The above occurred at page 77,78 in the trial transcript.

Therefore, when the government in their brief try to pass the buck to Heimerle's counsel for eliciting the reference to the half=way house. It is a blatant distortion of the facts. But it did not end at that point, because Mr. Horowitz conveniently blurts out another strategically placed reference to Heimerle and prison again by stating:

> " His: Where he met Mr. Peters. That's where he[Heimerle] met Mr. Peters: in GreenHaven Prison."

to a question that was not asked of him at page 92 of the trial transcript. There can be no serious argument that the above stated facts regarding prison are inadmissable. And accordingly, the government did not present one. However, there is one point to be added to Mr. Horowitz's testimony. And that is, if the jury was not given Heimerle's judgment and conviction papers after they were read to them by the prosecutor in toto./[1] It may have been argued that the jury did not believe Horowitz's testimony. However, since the commitment order in the government's exhibit 7 clearly stated that Heimerle's one (1) year sentence was to commence after Heimerle serves his State sentence[GreenHaven State Prison]. The prosecutor by virtue of the introduction of the two [arguendo] admissable convictions did what he could not have done under any rules of evidence or case law precedents, i.e., advise the jury that Heimerle was an ex con and at the same time substantiate their witness' Horowitz testimony. And it can not be seriously challenged that the prosecutor did not realize that by introducing the two (2) judgment and commitment papers -- he was in fact -- introducing three (3) prior convictions. One of which was totally inadmissable. See trial transcript page 441 .

Thus, without reaching the introduction of the two (2) prior convictions, erroneously, by the Court. Ralls v. Manson, 375

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1. The prosecutor, Mr. Naftalis, upon completion of reading the exhibit in its entirety passed it to the jurors and they perused the document as he read to them the second exhibit in its entirety. This too was perused by the jurors i.e., exhibits 7 and 8.

F.Supp. 1271 (D.C.Conn.) (rev'd on other grounds) 503 F.2d. 491 wherein the court relied on the holding of U.S.v. Harrington, 490 F.2d.487 (2d cir.1973) determined that evidence that consisted of a 'mug shot' was a violation of the basic Fifth Amendment right to a fair trial. Therefore,in the instant case, where there could be no doubt whatsoever that Heimerle served a prison term-- for a crime that was only open to speculation and conjecture among the jurors. Is by far,more damaging than the 'mug shots' that the court in Balls v. Manson, supra and the court in U.S.v. Harrington SUPRA, spoke of. Because of the fact that a 'mug shot' does not necessarily determine that the arrest culminates into a conviction. However, in the instant case the government (in their case-in-chief) by verifying their witness' testimony as to Heimerle's prior imprisonment -- that most certainly had to be a conviction -- broke the

> [b]asic tenet of our criminal law. If,at his trial, a defendant does not take the witness stand in his own defense, and if he has not himself been responsible for causing the jury to be informed about his previous convictions, he is entitled to have the existence of any prior criminal receord concealed from the jury. The defendant's right to this protection is so well understood that discussion of it is unnecessary.
> (U.S.v. Harrington, supra, 490)

Thus, based on the holdings in the above cited cases, and the cases relied upon therein. Coupled with the fact that it was the government that elicited Heimerle's State conviction [for an unknown crime] through their witness Horowitz. And later in the trial from the witness Peters [during their case-in-chief] also.

Based on the aforementioned facts as they relate to the third [unspecified] conviction of Heimerle. Coupled with the erroneous introduction of the two (2) prior counterfeiting convictions. One of which substantiates Peters and Horowitz's testimony. The conviction should be reversed.

Turning now to the two (2) erroneous prior counterfeiting convictions [exhibits 7 and 8] being introduced by the government during their case-in-chief. The words of Judge Gurfein, Circuit

Judge Second Circuit Court of Appeals did not take long to become reality. That is, in U.S.v. Rossenwasser, 550 F.2d.806, at 814 stated:

> " I predict with unhappy confidence that the majority opinion will be cited in all manner of circumstances as establishing that anything goes[similar offense cases] so far as multiple defendant trials are concerned. In my view, that is not good for a balanced and fair system of criminal law. There are few areas in which it is as important for this court to keep a watchful eye as on the admissability of similar offenses in a case involving more than a single defendant. For this case is only a variation of the BRUTON problem."

It should be noticed that the learned [over zealous prosecutor] who always relies heavily on many case precedents in appeals that he is a part of. Has cited only two to support his introduction of Heimerle's State conviction supra. And as Judge Gurfein predicted, the prosecutor has cited it for anything goes.

Insofar as the counterfeiting convictions being mechanically introduced into evidence [not through a witness] by the prosecutor. There is not a case that he relies on that is on point to the method of introduction in the instant case. Thus it is submitted that this Court take notice that Congress at the time of drafting the rules that are applicable to the instant case stated:

> " One other clarifying amendment has been added to this subsection, that is, to provide that the admissability of evidence of a prior conviction is permitted only upon cross-examination of a witness. It is not admissable if a person does not testify....."
> (accord 28 U.S.C.A., Fed.R.Evid.,p. 809-last paragraph)

Also see

> " If a criminal defendant does not take the stand,the prosecutor may not establish that the defendant committed other misdeeds, whether amounting to a conviction or not"
> (accord U.S.v. Perry, 512 F.2d. 805 (6th cir. 1975)

and of course, U.S.v. Warf, 529 F.2d. 1170 (5th cir. 1976) which was previously relied upon in Heimerle's point III argument. See Fed. R.Evidence supplementary pocket part on non-testifying defendant 28 U.S.C.A., 1977. And now also relied upon as applicable to the erroneous admission of the two (2) prior counterfeiting convictions.

Finally, there is more than a suggestion of double jeopardy -- there is the fact that the government witness Peters -- testified before the Grand Jury as follows:

Q. " Now, you were interviewed by a special agent of the Secret Service were you not, and shown a photograph, on the 23rd of January, 1976?

A. " I want to get into the record here. I sent for Secret Service, and I asked them, and I told them about the counterfeiting. I want that entered into the record.

Q. " In the course of your conversation with the Secret Service, did you indicate to them that Mr. Heimerle had sold half a million dollars worth of counterfeit--

--"

A. " Yes "

Based on the above it can hardly be argued that the government had knowledge of the alleged counterfeiting activities of Heimerle, prior to the arrest in the case that resulted into government's exhibit # 8. Since the above testimony was presented to the grand jury on March 4, 1976: which was prior to the conviction referred to in government exhibit # 8. Had the arraignment in the instant case been timely --[the instant indictment was handed down on April 29, 1976 -- the arraignment took place on May 11, 1976.] Because of the deliberate delay Heimerle was precluded from motioning the court for joinder of the indictments and/or offenses under rules 8 and/or 13 Federal Rules Criminal Procedure. The arraignment was stalled off until approximately one week after the trial in G-X 8 was completed.

Had that not been the case all the alleged offenses that all stem from the same alleged transaction/[2] could have been tried together instead of stringing them out like taffy. Since the government is of the belief that Heimerle and the illicit printing

press [see page 4 of the government's petition under § 3575] mentioned therein make him dangerous. Nevertheless, this unindict-

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2. See Black's law dictionary on 'transaction'

able [apparently] offense has turned the count of conspiracy in the instant case from a five year to a ten year maximum term.

This is certainly multiple prosecutions. See Ex Parte Nielson, 131us176 (1889) and its progeny in the second circuit. Schroeder v. U.S., 7 F.2d. 60 (1925); U.S.v. Levison, 54 F.2d. 363; Schrecther v. U.S., 7 F.2d. 881 (1925); U.S.v. Wexler, 79 F.2d. 526 (1935); U.S.v. Crushiata, 59 F.2d. 1007 (1932); Rouda v. U.S. 10 F.2d.916 (1926); Short v. U.S., 91 F.2d. 614 (4th cir. 1937; U.S.v. Mallah, 503 F2d. 971 (2d cir.1973).

Thus, the government has turned what is a single conspiracy [based on peters testimony] i.e., there can be no doubt that the alleged conspirators [indicted or otherwise] all had one common aim -- and that was to pass on the alleged counterfeit. Therefore, if all defendants were joined into a single trial [a total of five comprising both trials] chances for prejudice to any one defendant would have been minimal. And had Heimerle not been precluded from motioning for joinder -- the court would have been hard pressed to deny it -- due to the conspiracy holdings.-- However loose-knit of the second circuit.

It is submitted that the delay in arraignment was the government's tactical advantage to coerce Heimerle into cooperating, So there would be new charges always pending -- see Hearing transcript page 4 of the 3575 hearing before Judge Metzner:[that the government appealed from and which appeal was pending at the time of the second 3575 hearing before Judge Pollack in the instant case] It is urged that the court herein consider the duplicity of all the charges that the government has strung out from the Secret Service's single investigation.

It is also submitted that the Court herein take note of the petition submitted by the government to qualify Heimerle as a Special Dangerous Offender under § 3575; it is signed by Mr. Alan R. Naftalis, Special Attorney. And as such he was retained

under the provisions of 28 U.S.C. § 543 (a). Consequently, Mr. Naftalis did not have the authority to sign the petition -- or any other papers -- sua sponte. Because:

> In all Strike Force cases, documents which are to be filed with a clerk of the court, with a court, or with a U.S. Magistrate or Commissioner - including subpoenas, briefs, motions, legal memoranda, points for charge, stipulations, and petitions - shall be signed by both the U.S. Attorney and Strike Force Attorney in the following manner. (accord In RE PERSICO, 522 F.2d. 41 at appendix)

This was not adhered to. Furthermore, at present Mr. Naftalis is scribing Assistant United States Attorney to his name -- and unless Mr. Naftalis has been re-retained under the provisions of 542 (a) -- this too is erroneous. Nevertheless, the Special Offender portion of the Special Dangerous Offender statute was established on the unqualified signature of Mr. Naftalis [behind closed doors of the Strike Force office~~(presumably)~~ without any sort of due process safeguards-whatsoever]: now when all is taken in conjunction with one another (1):

> [This] is simply a recognition of the possibility that the same facts the establishment of which shows the defendant to fall within one or more of the definitions of "Special Offender" may, in a given case, also demonstrate that the defendant is "dangerous". (citation omitted, see government brief page 36)

coupled with (2):

> "...furthermore, it seems to me that the basis of notice [prepared by Mr. Naftalis sua sponte]that was sent out was a series of immutable occurances, namely, prior felony convictions, and what you needed to prepare yourself on the subject I am at a loss to understand? (Hearing on 3575 application, transcript page 704) Pollack, District Judge

is irrefutable proof that Heimerle's 3575 hearing was held behind closed doors -- or worse yet -- in the mind of the person that Heimerle allegedly refused to cooperate with, i.e., Mr. Naftalis. And based on the above observations -- it was Mr. Naftalis who passed judgment when he wrote:

" I--- do believe that said defendant [Heimerle] is a special [1&2 supra=Dangerous] offender for the reasons that this defendant has previously been convicted for... two or more offenses...."
(Notice to the court that the above-named defendant) (is....a dangerous special offender. See appendix)

Thus, the due process procedure in initiating proceedings under § 3575 are totally inconsistant with .....Due Process. As witnessed by the fact that before parole can be violated a hearing must be held before a neutral and detached body e.g. Morrisey v. Brewer, 408us471, which,of course, applies to probation e.g. Gagnon v. Scarpelli, 411us778, and,of course, to too many other less significant instances [3] -- just too numerous to mention.

In the instant case[s] there were other defendant's that met the criteria as they were applied to Heimerle, i.e., all of whom had two or more offenses, namely (1) Joe Peters (2) Bernard Horowitz, both of the instant case; then there was Julian Mitchell and possibly John Rawles of the exhibit 8 trial investigation. None of the above were prosecuted under § 3575 although at least three of them meet the criteria, which states simply:

> A defendant is a special offender for purposes of this section IF:

then goes on to state the criteria that three (3) of the above, if not four (4) meet.

If the statute is deemed to be constitutional. Well, then, it is not being applied as written. If, on the other hand, it was applied as written to every second offender [who comes under (e)(1) of § 3575] it would be unconstitutional on its face due to the fact that every sentence of one (1) year/one(1)day or more imposed on any defendant who meets the criteria of § 3575 (e)(1) should be increased to carry a maximum sentence of up to twenty five (25) years -- on the sole signature of any prosecutor -- who, by law, ought to apply it. Thus, as it is written, and as it must be applied -- congress has re-written the criminal code -- as it applies to second or more offenders -- sub silentio.

Based on all the defendants that were not tried under th statute since it was enacted. Heimerle, submits to this court, that he was arbitrarily prosecuted. And because of same the extr portion of the sentence [doubled in proportion to the prescribed sentence] should be set-aside by this court or, in the alternativ

3. e.g. 'SPECIAL OFFENDER' clasification IN PRISON. See HOLMES v. U.S. 641 F. 2d. 1243 (7TH Cir 197); PERSICO v. Dept of Justice, 431 F. Supp — (D.C. ILL 1977).

remanded to the court below for resentencing consistant with the statutory maximum prescribed by 18 U.S.C.§ 371 conspiracy staute, Because :

> Under dangerous special offender statute, maximum specified in statute defining offense is still maximum for all cases unless separate and further factual determinations are made; that is, additional factual determinations of "special" and "dangerous" must be made after verdict of guilty to support imposition of sentence greater than normally applicable to crime.
> (U.S.v. Neary, 552 F.2d.1184 [11]

Based on Judge Pollack's statement at page 704 of the Hearing transcript [p. 7 supra] both of the factual determinations were in fact made prior to the verdict -- by none other than Mr. Naftalis. Which, of course, brings us to the due process circle once again:

> Excercise of the prosecutor's discretion so as to utilize dangerous special offender statute against defendant, who was convicted of concealing and disposing of securities moving in interstate commerce, valued at $5,000 or more, knowing them to have been stolen, did not violate due process or guarantee against cruel and unusual punishment, notwithstanding alleged absence of standards to guide prosecutorial discretion.
> (U.S.v. Neary, supra [20][21]

Heimerle contends that there was not any standards for the application of the § 3575 statute in the instant case. And in any event; Mr. Naftalis did not by letter of his authorization, as a Special Attorney, have the authority to submit the § 3575 petition without the United States Attorney Signature for the Southern District of New York affixed thereto.

In conclusion it is also submitted that Heimerle has met his burden of demonstrating that both offenses [indictments 76 CR 146 (CMM) and 76 CR 442 (MP)] by virtue of Peters grand jury testimony as set forth on page 5 supra, insofar that Heimerle was being investigated for counterfeiting prior to any arrests that ultimately became indictments that then became convictions.

However, Heimerle asks; would the:

> [r]esult in this case ...be different " if any action by the government contributed to the separate prosecution on the lesser and greater charges" ante n.14,n.20. I wonder how the grand jury happened to return two separate indictments.

(accord Jeffers v. U.S., 45 LW 4691 Mr. Justices Stevens Brennen, Stewart, and Marshall dissent n.2)

when one prosecutor [Mr. Naftalis] has been assigned to Heimerle from the very outset i.e., from the Magistrate arraignment right on to and including the instant appeal. And even stranger is the fact that both indictment[s] were handed down by two [2] separate grand juries.- Or could it be that if all the evidence was presented to one [1] grand jury -- they may have included all of Heimerle's alleged counterfeiting activities into the confines of a single indictment?

Heimerle is well aware that the Grand Jury and not the prosecutor votes to indict. However, in the instant case, unlike U.S. v. Steel, 238 F.Supp.580, accord Ostrer v. Aaronwald, 434 F. Supp.379, 395 (S.D.N.Y.1977) Heimerle's refusal to cooperate had additional evidence presented to a different grand jury, [incidently this appellant is not the only person who Mr. Naftalis has gone to lengths to coerce into cooperating with Gestapo like tactics, see Ostrer v. Aaronwald, supra]

CONCLUSION

THE JUDGMENT AND CONVICTION SHOULD BE VACATED AND SET ASIDE AND THE INDICTMENT DISMISSED OR REMANDED FOR A NEW TRIAL FREE FROM CONSTITUTIONAL ERRORS DENYING DUE PROCESS; OR AT THE VERY LEAST REMANDED FOR RESENTENCING IN CONFORMITY WITH DUE PROCESS STANDARDS.

Respectfully submitted,

James F. Heimerle

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
- x

UNITED STATES OF AMERICA,
Appelle

-v.-

76-1576

JAMES F. HEIMERLE, RICHARD WARME
a/k/a/" Richard Warner,
Appellanta

- x

STATE OF GEORGIA)
: s.s.:
COUNTY OF FULTON)

JAMES F. HEIMERLE, being duly sworn, deposes and says:

I am the above named appellant and that I make this affidavit in good faith for the following reasons.

1. On October 5, 1977 I received from my assigned counsel Eleanor Jackson Piel, a copy of the government's reply brief in the above-entitiled case.

2. There are issues that I insist be covered in a reply to the government's brief, however, since the time for replying per the rules of Appellaete procedure are short. And the late receipt of the government's brief by this affiant will not permit him to forward the issues that he insists be covered to his assigned attorney. Affiant is submitting in his own behalf a supplementary brief.

3. The aforementioned SUPPLEMENTARY REPLY BRIEF will be sent out from the Atlanta United States Prison by this affiant by placing the SUPPLEMENTARY REPLY BRIEF [in the above-entitled case]into the undersigned prison official's hand to be sent via certified [recp't requested] mail; addressed to:

(1) Clerk, 2d cir. Court of Appeals
(2) Irving R.Kaufman, Chief Judge
(3) Robt.B.Fiske,Jr., U.S.Attorney-S.D.N.Y.
(4) Eleanor Jackson Piel, Esq.

(1)(2) and (3) United States Courthouse-Foley Square,N.Y.,N.Y
(4) 36 West Forty-Fourth Street, N.Y.,N.Y. 10036

on October 7th 1977

Respectfully etc.,

James F. Heimerle

Sworn to before me this
7th day of October,1977

Parole Officer: Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

OCT 7 1977

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

CYNTHIA LYNN being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at BROOKLYN, NEW YORK

Check Applicable Box

☑ Affidavit of Service By Mail — On November 7,. 19 77 deponent served the within SUPPLEMENTARY REPLY BRIEF FOR JAMES F. HEIMERLE upon Hon. Robert B. Fiske, Jr. attorney(s) for U.S. Atty. for Southern District in this action, at No. 1 St. Andrews Plaza, N.Y. 1000 the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal — On 19 at upon

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

Index No.

UNITED STATES COURT
FOR THE SECOND CIRCU

UNITED STATES OF AME

Ap

-v-

JAMES F. HEIMERLE,
WARME, a/k/a Richar

Defendant

SUPPLEMENTARY RE
BRIEF FOR JAMES F.

ELEANOR JACKSON PI

Attorney for

Office and Post Office Addr

To

Attorney(s) for

Service of a copy of the within

Dated,

Attorney(s) for

Year 19 .

OF APPEALS
IT

RICA,

pellee,

RICHARD
d Warner,

s-Appellants

PLY
HEIMERLE

EL,

ss, Telephone

is hereby admitted.

XCHANGE PLACE, N.Y. 10004